United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: November 28, 1997

TO : William C. Schaub, Regional Director
Region 7

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: International Union, UAW, and Local 2500
(Metro East Drug Treatment Corp.) 593-2075
Case 7-CG-34 593-4014

This case was submitted for advice on the question of whether the Employer's alleged unfair labor practices excused the Union's failure to give a Section 8(g) notice of intent to strike a health care institution.

FACTS

The Employer is a nonprofit organization which provides outpatient substance abuse and methadone treatment services to the general public. The Region has concluded that the Employer is a health care institution within the meaning of Section 8(g).[1]

The Union was certified as the collective-bargaining representative of unit employees on February 27, 1996. The parties have engaged in contract negotiations but have not reached any agreement. The relationship between the Union and the Employer is apparently acrimonious and has resulted in the filing of a variety of CA and CB charges. The Region has issued complaints as to the charges described below:

1. Case 7-CA-39948, a Section 8(a)(5) and (1) charge filed on June 19, 1997,[2] alleges that on May 28, the Employer unilaterally implemented a "pay for performance" system and consequently gave several employees $100 bonus checks on June 11. However, during the week of July 7, the Employer told employees that the bonus program had been canceled

---

[1] See, e.g., Keyway, 263 NLRB 1168 (1982); Sodat, Inc., 218 NLRB 1327 (1975).

[2] Unless otherwise noted, all events occurred in 1997.

because the Union had filed a charge attacking the program's implementation.

2. Case 7-CA-4002, a Section 8(a)(1) charge filed on July 8, alleges that the Employer solicited and coerced five employees by offering each employee $500 to sign a decertification petition.

The Region has dismissed other charges and is investigating additional charges.

On July 28, the Union commenced a strike against the Employer, without having given a Section 8(g) notice. The strike is ongoing, although the Union has recently claimed that employees will shortly offer to return to work.

The Region determined the following as to the circumstances under which the employees decided to strike:

1. A Union meeting was held on June 28. At that time, a strike was discussed but employees decided that it was not the right time to strike. The decision to strike was made at a Union meeting held on July 26, just before the strike began on July 28. The Union gives different reasons for the decision to strike at that time, noting employee discussions about dissatisfaction with a number of Employer actions, including reprimands of two employees and a change in operating hours at one facility, that are not the subject of unfair labor practice charges. The two Union witnesses made available to the Region gave the following explanations of the strike decision:

(a) Union official John Henry Davis stated, Due to the ulps which were filed, the conduct of [Employer representative] Barnett,[3] etc., the employees felt that it

[3] As noted above, the Region has issued complaint in Case 7-CA-4002, which alleges that the Employer, through Barnett, solicited and coerced five employees by offering each employee $500 to sign a decertification petition. However, the Union's assertion that employees decided to strike in part because of the Employer's circulation of the decertification petition is suspect because the Union's attorney refused to allow her witnesses to give affidavits to the Field Attorney, prompted her witnesses and added her own statements to their answers.

was necessary to go on strike that Monday [July 28] and not [sic] waiting.

(b) Employee Patricia Coleman stated, about the July 26 meeting, ...everyone was just so fed up with what was happening that we wanted to strike on Monday.

Until now, strikers have distributed handbills that urge the Employer's clients not to talk to the Employer's counselors but instead to deal with the employees on strike. The Employer further asserts that there has been daily picketing, chanting and handbilling encouraging patients to go elsewhere for treatment and that its patient census has been reduced. Employees of a laboratory that usually picks up blood samples from the Employer have refused to cross the Union's picket line. Consequently, the Employer has been delivering the blood samples to the laboratory. However, the Employer has not provided specific or supporting information tending to show that the abrupt start of the strike had a significant impact on patient care.

As noted above, the Union has never given a Section 8(g) notice. There is evidence that the Union was aware of the notice requirements imposed by Section 8(g) before the Union began its strike; however, the Union asserts that, under Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956), it was not required to give such a notice because the employees struck to protest the Employer's unfair labor practices.

ACTION

We conclude that a Section 8(g) complaint should issue, absent settlement.

The basic purpose of Section 8(g) is to provide sufficient notice, statutorily defined as 10 days, to a health care institution of an impending strike, picketing or other concerted refusal to work to permit the institution to make the necessary plans to provide for patient care during the labor dispute.[4] However, in order to

[4] See S.Rept. 93-766, 93d Cong., 2d sess., Coverage of Nonprofit Hospitals under the National Labor Relations Act.

assure employees in the health care industry of the same statutory rights provided to other employees, the Board has held that a health care employer's "serious or flagrant" unfair labor practices excuse a union's failure to give a Section 8(g) notice before engaging in a strike.[5] To prevail with such an argument, a union must initially show (1) that the employer committed unfair labor practices that met the standard of seriousness established by Mastro Plastics, supra,[6] and (2) that those unfair labor practices were a reason for the union's strike.[7]

Thus, in Park Inn Home for Adults, 293 NLRB 1082 (1989), the employer told employees, on two consecutive days, that they had could choose between accepting unlawful unilateral changes -- the cessation of employer payments into employee trust funds -- or being terminated. Several employees left the premises and were discharged; other immediately commenced a strike, without giving a Section 8(g) notice. The Board concluded that the employees were excused from giving the Section 8(g) notice because the employer had bargained in bad faith, had made unlawful unilateral changes, and intended to provoke a strike, "with the aim of undermining and ultimately destroying the bargaining relationship between itself and the [u]nion." Id. at 1088.[8]

Similarly, in CHC Corp., supra, 229 NLRB at 1011, the Board held that the Mastro Plastics exception to 8(g) notice requirement was met where the employer repeatedly canceled scheduled grievance meetings and hid in his office to avoid dealing with the union, so that employees were "[g]oaded beyond endurance" when they left their work

---

[5] See Council's Center for Problems of Living, 289 NLRB 1122 (1988), enf. den. 897 F.2d 1238, 133 LRRM 2895 (2d Cir. 1990).

[6] See Hospital Employees District 1199E (CHC Corp.), 229 NLRB 1010, 1011, n. 3 (1977).

[7] See Betances Health Unit, 283 NLRB 369, 370 (1987).

[8] See also Cedarcrest, 246 NLRB 870 (1979).

stations to look for the employer even though they did not give an 8(g) notice of their intent to cease work.[9]

The Board found the Mastro exception not applicable in West Lawrence Care Center, 308 NLRB 1011 (1992). There, the Board agreed with an ALJ's finding that the employer's unfair labor practices were not so serious as to excuse the union from giving a Section 8(g) notice. The employer refused to allow a union representative onto its premises, removed union literature from a union bulletin board, threatened employees who were wearing union buttons, engaged in surveillance of union agents, and caused the removal of a union business agent from the nursing home's premises.[10]

The second requirement -- a causal relationship between the employer's unfair labor practices and the employees' decision to strike -- was missing in Betances Health Unit, 283 NLRB 369, 370 (1987), where the Board

---

[9] In Mastro, the unlawful discharge of a key union supporter "at once precipitated the strike....," 350 U.S. at 273, thus excusing the union's strike within the 8(d) period. See also Mrs. Fay's Pies, 145 NLRB 495 (1963). There, the Board found that Mastro privileged a strike in the absence of an 8(d) notice because, after several months of union-employer negotiations for a new contract, the employer announced, on May 4, that it was terminating the contract and withdrawing its contract proposals and so informed the employees the next day. The employees began a strike on May 9. The Board found, at 497, that Mastro was applicable because the union struck "only after its further efforts to negotiate were stifled by the respondent's rejection of the union as the majority representative."

[10] See also Puerto Rico Junior College, 265 NLRB 72, 79 (1982) (even though employer violated Section 8(a)(5) and (1) by unilaterally discontinuing faculty evaluations and thereafter refusing to bargain with the union about the inclusion of these subjects in a contract, the union violated Section 8(b)(3) by failing to give a Section 8(d) notice before striking because the unfair labor practices did not "stem from a rejection of the union as majority representative" and were not "of such a flagrant nature" as to excuse the union from compliance with Section 8(d)).

found that employees struck because of the lawful transfers of some employees and discharges of other employees, not because of the unlawful discharges of other employees and the employer's Section 8(a)(1) statements. The ALJ found, at 382, "Also on October 23 or 24, after becoming aware of the transfers, certain of the employees at Betances decided to call a strike on Monday, October 27." At 389, the ALJ described the transfer of certain employees as "the proximate cause" of the strike. The discharges found unlawful had occurred on September 9 and October 9; employees were aware of and unhappy about the discharges. Indeed, employees engaged in a strike to protest the first discharge, although it does not appear that the employees' failure to give an 8(g) notice before that strike was raised. The Section 8(a)(1) statements were made during the period before the two unlawful discharges. The Board therefore found that the employees had engaged in an economic strike and, because they had failed to give a Section 8(g) notice, the strike was unprotected and the employer did not violate the Act when it discharged an employee for engaging in the strike.

Furthermore, it appears that in those cases in which the Board has excused the absence of compliance with Section 8(g) because of an employer's flagrant unfair labor practices, (1) the absence of compliance had only minimal impact on the provision of health care, and/or (2) there was some limited compliance, so that the absence of compliance was, at most, a technical violation of Section 8(g). For example, in CHC, supra, the Board found that, despite the absence of an 8(g) notice, a union work stoppage that had lasted between five and 15 minutes was nonetheless protected in part because had been provoked by an employer's serious unfair labor practices and had no impact on the delivery of health care. There, the Board noted, 229 NLRB at 1011:

> While as a general proposition the Board is concerned with the possibility of harm rather than actual harm resulting from strikes, picketing, or other concerted refusals to work at health care institutions, where one party to a dispute is so clearly in the wrong, and the other is provoked to a minimal and innocuous transgression, the fact that no harm was caused is important. Here, the Charging Party

> [employer] impeded the bargaining process and the record fails to establish that Respondent caused harm to any patient. We see no reason, therefore, to assess any blame against the Respondent [union].[11]

The second situation -- limited compliance and a technical violation -- was present in Council's Center, supra, where the union and the employer had numerous disagreements, concerning, among other things, the employer's failure to sign a prior contract and the belief of some employees that the employer had cheated them of money they were due. The ALJ concluded, however, that the employees struck to protest the unlawful discharges of other employees. In reaching this conclusion, the ALJ noted that the economic disputes had been the subject of numerous union meetings but that employees voted to strike only after the union called a meeting immediately after 11 employees had been discharged. The union gave a 10-day notice consistent with Section 8(g) but then realized that the date scheduled for the commencement of the strike was the day before employees were scheduled to be paid. The union then decided to postpone the strike one day, so employees would receive their paychecks, but did not notify the employer or the FMCS about this postponement. During the 10-day period, the employer refused to meet with federal mediators. The ALJ found, at 1148, that the employer's conduct was "calculated to undermine the collective-bargaining process and, therefore, was conduct that released" the union from any obligation to comply with Section 8(g). The Board, at 1122 fn. 3, agreed with the ALJ that the Mastro Plastics exception to Section 8(g) excused the union from giving a Section 8(g) notice. The Board then also found "no basis for concluding that the resultant delay operated to remove the Union's strike from the Mastro Plastics rationale." The Board held, 289 NLRB at 1122 n. 3, that it was unnecessary to pass on the ALJ's conclusion,

---

[11] See also Park Inn Home for Adults, supra, 293 NLRB at 1088, where, in concluding that the employer acted unlawfully in discharging employees or leading employees to believe that they had been discharged, the Board noted that when police escorted employees from the building, they saw new employees "begin to arrive virtually simultaneously to perform their jobs...."

at 1148-1150, that the union had actually informed the employer of the postponement in the starting date of the strike.

In Park Inn Home for Adults, supra, the ALJ found, 293 NLRB at 1106, that the union had twice notified the employer of scheduled strikes should a new contract not be reached, the union postponed the strikes, and the employer committed egregious unfair labor practices. The union then struck without giving an 8(g) notice. The ALJ found that the union had "complied with the spirit, if not the letter, of Section 8(g)."

Here, the Region concluded that two unfair labor practice charges the Union filed against the Employer are meritorious. The Union asserts that it has struck to protest these unfair labor practices and was therefore excused from giving a Section 8(g) notice. Even assuming, without deciding, that the Employer's alleged unfair labor practices are serious enough to fall within the Mastro exception to the 8(g) notice requirement, we nonetheless conclude that the Union here violated Section 8(g) by not giving the required notice.

As noted above, the Union had time to give a notice before commencing its strike.[12] Unlike Mastro and CHC, this is not a situation where a strike was a spontaneous reaction to an employer's unfair labor practices. We note that there was no precipitating serious unfair labor practice arguably provoking or "goading" the Union into starting its strike without first having given a 10-day notice. Instead, the employees decided to strike because they were unhappy about several actions that the Employer had taken during the previous months. Some, but not all,

---

[12] The alleged unfair labor practices occurred in late May and early June. It is not clear when the employees learned of these alleged ULPs, although Union meetings were held on June 28 and July 26. The Union filed the charges in Cases 7-CA-39948 and -4002 on June 19 and July 8, respectively. However, the Union did not commence the strike until July 28, or five and three weeks after filing the respective charges.

of these actions have been the subjects of unfair labor practice charges.

Furthermore, the Union knew of its Section 8(g) obligation and had sufficient time to give the required notice before commencing its strike. Nonetheless, the Union failed to give any notice whatsoever.[13] Nor has the Union explained its failure to give any Section 8(g) notice. Thus, this case is distinguishable from those in which, despite the absence of complete technical compliance with Section 8(g), there was some notice to the employer.

Also unlike CHC, this is not a case involving a brief work stoppage without effect on patient care. The strike has lasted for several months. The Employer has reported that the strike has affected clients/patients, who at the the start of the strike were turned away from the facility at the urging on the strikers; it is not known whether these clients/patients have obtained equivalent treatment elsewhere or have gone without treatment. Furthermore, employees of a laboratory that handles blood samples collected at the Employer's facility at the beginning of the strike have refused to cross the picket line, prompting the Employer to use its employees to deliver the blood samples to employees of the laboratory.

For all of the above reasons, we conclude that a Section 8(g) complaint is warranted, absent settlement.

B.J.K.

[13] Cf. Council's Center, supra, 289 NLRB at 1122 fn. 3.